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NO. 386

In the Supreme Court of the United States

OCTOBER TERM, 1940

CONTINENTAL OIL COMPANY, a Corporation,
Petitioner and Appellant Below,

VERSUS

H. C. JONES, Collector of Internal Revenue,
Respondent and Appellee Below.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND SUPPORTING BRIEF

D. A. RICHARDSON,
First National Bank Building,
Oklahoma City, Oklahoma,

A. L. HULL,
Continental Office Building,
Ponca City, Oklahoma,

Attorneys for Petitioner.

Dated August 27, 1940.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

TO THE HONORABLE

THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Continental Oil Company, prays that a writ of certiorari be issued to review a judgment of the United States Circuit Court of Appeals for the Tenth Circuit affirming the judgment of the District Court of the United States for the Western District of Oklahoma in favor of respondent and against this petitioner.

STATEMENT

This is an action by petitioner, Continental Oil Company, a Delaware corporation, against H. C. Jones, Collector of Internal Revenue, to recover excise taxes in the sum of $699,131.32, plus interest, assessed and paid under

Sections 601(c) (1) and 617, Title IV of the Revenue Act of 1932, 47 Stat. 169, 259, and under Section 211 of the National Industrial Recovery Act of 1933, 48 Stat. 195, 208.

Petitioner was engaged in producing and manufacturing gasoline and lubricating oil and selling the same at both wholesale and retail during all of the time involved by the issues in this case (R. 5, 29).

Conoco Oil Company (herein called "Conoco") was a Delaware corporation, organized in August, 1929, for the purpose of marketing petroleum products in the Great Lakes Region, and it was engaged in that business continuously from the date of its organization until sometime in 1935. It was not a producer or manufacturer. Its capital stock was wholly owned by petitioner (R. 68, 73-4).

It had offices in Chicago from which its business in those states was transacted, and it had about fifty employees therein (R. 120-1). From its organization it owned real and personal property in each of the states in which it did business, which stood in its name. It owned service stations, trucks, and other equipment, all bearing its name (R. 74-5). Its general policies were determined by its officers and directors in Ponca City (R. 119-20) but its marketing operations were conducted from its offices in Chicago (R. 121). It paid the salaries of its employees and the taxes on its properties from its Chicago offices (R. 121-2). Its accounts receivable ledgers, personnel records, bills payable ledgers, and merchandise ledgers were kept in its office in Chicago (R. 150-1). It sold to

jobbers, retailers, and consumers, and had storage at about seventy-five points where it received tank car shipments (R. 232). It had its own bank account in Chicago, which was maintained from funds derived from its sales. All operating expenses were paid from the banking funds, and when more funds were in bank than currently needed, remittances were sent to apply on the open account with petitioner for purchases of petroleum products (R. 238-9). Its manager at Chicago never took part in the purchase of any gasoline (R. 235). Its officers in Ponca City always made or arranged for its purchases (R. 233). Its business was, and for three years had been, the purchase and sale of oil and gasoline as a dealer, and it had previous to the purchases here involved, purchased practically all its requirements from petitioner.

The general offices of all of petitioner's subsidiaries, including Conoco, were in petitioner's office building in Ponca City, Oklahoma. Conoco's general books of account were kept there by the same employees who kept petitioner's books, and most of its chief officers who directed its affairs were also officers of petitioner and worked for both (R. 123; 133-4; 149-50; 158; 178; 261-2; 266); but Conoco always paid its proportion of the salaries of the employees and officers who did work for both, and its proportion of the administrative and overhead expenses, computed on the basis of the gallonage handled and marketed. Its board of directors met in Ponca City (R. 76; 109-10; 158).

Negotiations carried on between petitioner's officers and those of Conoco from June 6 to June 20, 1932, resulted on the latter date in petitioner's sale to Conoco of 18,407,760 gallons of gasoline then in various terminals of Great Lakes Pipe Line Company at the price of $1,243,303.90. On that day petitioner executed, acknowledged, and delivered to Conoco a bill of sale of the gasoline (R. 70-1; 105), describing it as in the possession of Great Lakes Pipe Line Company in its terminals in Chicago, Des Moines, Kansas City, Minneapolis, and Coralville, Iowa, stating the end points of the gasoline, the quantities sold of each end point in each terminal, and the sale price (Plf's. Ex. 5, R. 412). On the same day petitioner sent to Great Lakes, which is a common carrier, a teletype message describing the gasoline, and stating that petitioner had that day sold and delivered the gasoline to Conoco and that "further movement by you of this gasoline will be subject to orders from the said Conoco Oil Company" (R. 72; 415-6). Thereupon Conoco, by G. F. Smith, its vice-president, executed to petitioner a receipt for the gasoline (R. 105; 412) and Conoco was charged on petitioner's books with the purchase price, and the inventory account of the gasoline was transferred from petitioner's to Conoco's books (R. 108-9; 156-7; 206). The receipts from the sale of this gasoline were not "ear marked" for transmittal to petitioner, as sales by an agent would be, but the purchase price of the gasoline, as of previous purchases, was paid to petitioner by Conoco through its usual procedure, that is, by payments on the open account as funds were avail-

able after paying regular expenses (R. 208; 238). Conoco's requirements were from three to four million gallons of gasoline per month (R. 139-40), and it disposed of this entire inventory by the end of the year 1932 (R. 139).

Prior to the sale, the manner of handling Conoco's business had been this: Its general policies were determined by its officers in Ponca City, generally after a conference with petitioner's officers on the more important matters. Conoco's officers themselves, however, made its ultimate decisions, and its officers and managers handled its transactions (R. 116-17; 120). Quarterly in advance Conoco's manager in Chicago prepared an estimate of the company's needs, and transmitted the same to Ponca City, where it was approved or modified by Conoco's chief officers, who were also officers of petitioner but were then acting for Conoco (R. 116-17; 120; 235). Upon the approval of the estimate petitioner would direct Great Lakes to accept Conoco's orders for gasoline and fill the same out of petitioner's stocks in Great Lakes' Terminals (R. 124; 128-9). Thereupon Conoco would place its orders for gasoline directly with Great Lakes, sending copies thereof to its general office at Ponca City. Great Lakes would fill the orders and deplete petitioner's inventory by the amount thereof, and petitioner would charge the gasoline to Conoco. E. S. Karstedt was petitioner's vice-president in charge of sales, and was also vice-president of Conoco (R. 180-3; 256-62; 233-4). Both petitioner's and Conoco's sales departments were subject to his general supervision. The marketing departments of petitioner and of Conoco

were under him, and L. T. Cramer was manager of the sales division thereof (R. 178-181; 260-2).

In each company there was a division of the marketing department known as the "order and distribution division" (R. 133-4; 180-3; 189; 196). It kept the records of such company's available oil and gasoline in the refineries and various storage points, the grades thereof, and the amount and location of all gasoline owned by each. All orders received by either company for gasoline, after being accepted by its marketing department, were then turned to its order and distribution division. It was the latter's duty to determine the source of supply from which the order could be filled most economically, and to place the order with that source of supply. The same personnel served each company as an "order and distribution division," their salaries being allocated to each company.

As a division of petitioner, it saw that all of petitioner's stations and marketing outlets were properly supplied. If petitioner had stocks in its own refineries or storage, its order would be placed against those stocks. If petitioner had no stock at a point from which its order could be economically filled, this division would buy the gasoline from some one else at such point. It functioned in a similar manner as a division of Conoco's marketing department. That Division had always so functioned both for petitioner and for Conoco (R. 123-4).

When petitioner made the sale to Conoco on June 20, 1932, both petitioner's and Conoco's books reflected the sale

and Conoco's ownership of the gasoline (R. 108; 156-7; 205-6), and thereafter Conoco, through its officers and its order and distribution division, controlled that gasoline (R. 120; 133-5; 159). Also the records of the petitioner's order and distribution division showed Conoco's ownership of that gasoline. Thereafter, as Conoco drew upon that stock in Great Lakes' terminals, no charge therefor was made against it on petitioner's books, because Conoco was drawing upon its own stock (R. 157); but a record of the withdrawals was kept both by petitioner and by Conoco. Conoco continued to place its orders for gasoline with Great Lakes, the only difference being that it was ordering the delivery of its own gasoline instead of gasoline belonging to petitioner. Sales by Conoco of gasoline which it purchased from petitioner on June 20, 1932 and June 14, 1933 were not entered on petitioner's books (R. 157).

After the sales to Conoco the order and distribution division of each company continued to function as before. There were occasional instances where that division, acting for Conoco, sold a part of the latter's gasoline to petitioner. If petitioner needed gasoline to supply a customer at a place near which Conoco had gasoline and petitioner did not, the latter bought the gasoline from Conoco and paid or credited it with the purchase price. Altogether, out of the 26,715,360 gallons of gasoline sold to Conoco, on the two dates involved, petitioner and another subsidiary of petitioner bought back 704,000 gallons (R. 140-1). In all instances these sales by Conoco were made by its order

and distribution division, functioning under the direction and authority of Conoco's chief officers in Ponca City.

Although petitioner notified Great Lakes on June 20, 1932, that it had sold the gasoline to Conoco, and that further movement thereof would be subject to Conoco's orders, Great Lakes did not change its books in respect to the ownership of the gasoline (R. 129-30). Its books showed all gasoline received from petitioner as belonging to petitioner regardless of whom it was sold to (R. 145). It considered it unnecessary that it keep such records, and was unwilling to be burdened with that extra detail (R. 129-30). Also, while Great Lakes kept depletion records of petitioner's stocks, it did not keep a separate depletion record of the gasoline in its terminals that was sold to Conoco, except that the depletion could be worked out through the orders that Great Lakes filled from those inventories; but a depletion record of those stocks was kept in the general offices of the respective companies in Ponca City.

Petitioner paid the taxes upon its subsequent sale of all gasoline which it bought back from Conoco (R. 141). Conoco, after buying the gasoline from petitioner, sold the same in competition with other dealers at the same general market price which other dealers in the same localities received for gasoline of the same grade (R. 270-1; 184-5).

The sale by petitioner to Conoco of the 8,307,600 gallons of gasoline on June 14, 1933, before the effective date of

the act increasing the tax from 1 to 1½ cents a gallon, was evidenced by a bill of sale bearing that date (R. 416-17) and similar to that of June 20, 1932. A receipt for that gasoline was executed by Conoco, and the circumstances leading up to the execution of the bill of sale were substantially the same as those leading up to the execution of the bill of sale of June 20, 1932 (R. 138). The tax of 1 cent a gallon was paid to petitioner by Conoco on that sale, and remitted to the Government.

Dealers in gasoline who were selling in competition with Conoco during the 15-day period prior to June 21, 1932, increased their purchases of gasoline from two to four times as much as they had theretofore purchased in a comparable period (Plf's. Ex. 12-22, R. 419-429) and "in order for Conoco to compete with them on an equal cost basis it was necessary for it likewise to purchase prior to June 21, 1932, stocks of gasoline largely in excess of its current demands. A like situation existed when the sale was made to Conoco in 1933" (R. 714).

The Commissioner refunded the tax on sales to Conoco of its "normal requirements," but held that sales to Conoco on June 20, 1932, and June 14, 1933, being in excess of Conoco's "normal requirements," were not effective to prevent the assessment of the tax against this petitioner upon the subsequent sale by Conoco of such gasoline, because the sales had been made by petitioner to avoid an imminent tax liability (R. 27; 16-17).

Upon the claim for refund being denied, petitioner filed

this action, within the time allowed, for recovery of the tax paid, plus interest. A waiver of jury was entered and the case tried to the Court. The opinion of the trial court was filed (R. 294-313) and judgment rendered against the petitioner. Appeal was had to the Circuit Court of Appeals for the Tenth Circuit, and the judgment of the trial court was affirmed on June 26, 1940.

This cause also involved excise taxes on gasoline and lubricating oil sold by petitioner to Continental Oil Company of Nevada at or about the same time as the sales to Conoco. As to those taxes petitioner acquiesces in the judgment below and the decision of the Circuit Court of Appeals; and by this proceeding it is sought only to have this Court review the judgment as to the taxes involved and arising in connection with the transactions and sales by petitioner to the Conoco Company, which taxes are approximately one-third of the amount sued for and hereinbefore stated.

JURISDICTION

The jurisdiction of this Court is invoked under Paragraph 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. Code Tit. 28, Paragraph 347).

The decree of the Circuit Court of Appeals was entered on June 26, 1940.

QUESTIONS PRESENTED

Did the transactions between petitioner and Conoco Oil Company, on June 20, 1932, and on June 14, 1933, respectively, constitute valid sales of the gasoline involved, divesting petitioner of the ownership of such gasoline, or was petitioner the owner thereof on June 21, 1932, and June 17, 1933, and taxable on sales of such gasoline made subsequent to those dates?

Incident to the determination of this, there are presented as errors the reasons relied on for allowance of the writ.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The Circuit Court of Appeals has decided this question in a way apparently in conflict with applicable decisions of this Court holding that an excise taxing statute must be strictly and formalistically construed, and that separate corporate entities must be regarded for tax purposes.

Founders General Corporation v. *Hoey*, 300 U. S. 268.

Raybestos-Manhattan, Inc., v. *United States*, 296 U. S. 60.

Hatch v. *Reardon*, 204 U. S. 152, 159.

2. If such decisions be held not applicable, then the Circuit Court of Appeals has decided, in a manner contrary to the intent of Congress as expressed in the statutes here involved, and contrary to the settled practice of the Treasury Department, an important question of federal law which has not been, but should be, settled by this Court, to-wit:

Under the manufacturer's excise tax act are a corporation and its wholly owned subsidiary to be considered as a single economic unit and sales between them refused recognition, and thus be nontaxable, or are they to be considered as separate entities capable of passing title from one to the other? If a transaction between a parent corporation and its subsidiary after the effective date of the act would be treated as a valid sale and therefore taxable, will the same transaction made before the effective date of the act be denied recognition as a valid sale?

Sec. 619(b), Rev. Act of 1932.

Int. Rev. Cum. Bul. XI-2, pp. 513, 514.

Art. 15 of Regulation 46, Rev. Act of 1932.

Pickwick Corp. v. *Welch*, D. C. Cal., 21 Fed. Sup. 664, 670.

3. The decision of the Circuit Court of Appeals is apparently in conflict with applicable decisions of this Court holding that a taxpayer has the right by lawful means to avoid an imminent tax liability.

Superior Oil Co. v. *Mississippi*, 280 U. S. 390.

Gregory v. *Helvering*, 293 U. S. 468.

4. The Circuit Court of Appeals has sanctioned a departure by the trial court from the accepted course of judicial proceedings resulting in depriving petitioner of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

Saunders v. *Shaw*, 244 U. S. 317.

Ga. Ry. & Elec. Co. v. *Decatur*, 295 U. S. 165, 171.

5. Petitioner did not include the tax in the price of the gasoline sold subsequent to June 20, 1932, or June 17, 1933, nor collect the amount of the tax from the vendee in such sales.

Sec. 621(d), Title 12, Revenue Act of 1932.

CONCLUSION

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court had in the case numbered and entitled on its docket, No. 1938, *Continental Oil Company, Appellant*, v. *H. C. Jones, Collector of Internal Revenue, Appellee*, to the end that this cause may be reviewed and determined by this Court as provided for by

the statutes of the United States; and that the judgment herein of said Court be reversed by the Court, and for such further relief as to this Court may seem proper.

Respectfully submitted,

CONTINENTAL OIL COMPANY,
Petitioner,

By D. A. RICHARDSON,

A. L. HULL,
Its Attorneys.

Dated August 27, 1940.